STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 12, 2015
v	No. 324413 Wayne Circuit Court
AARON WADE, Defendant-Appellee.	LC No. 14-000707-FC

Before: RIORDAN, P.J., and JANSEN and HOOD, JJ.

PER CURIAM.

The prosecutor appeals by leave granted[1] the trial court's order suppressing defendant's statement entered after a *Walker*[2] hearing. The trial court granted defendant's motion to suppress upon finding that he was incompetent to waive his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We vacate the trial court's order and remand for further proceedings consistent with this opinion.

This case arises from defendant's alleged participation in a carjacking and armed robbery that occurred in Detroit. According to defendant's confession, he and friends Marcus Dushan Lane and Antonio Curtis Gray[3] robbed Derrick Hood of "his money and weed because he robbed [defendant] in the past." Defendant waited in his car acting as "a lookout" while Lane and Gray robbed and carjacked Hood and robbed Hood's passenger Vennye Connoly.

[1] See *People v Wade*, unpublished order of the Court of Appeals, entered January 9, 2015 (Docket No. 324413).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Lane and Gray were originally charged with defendant as codefendants. They later pleaded guilty to carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. This Court denied Gray's delayed application for leave to appeal. See *People v Gray*, unpublished order of the Court of Appeals, entered September 29, 2014 (Docket No. 323298).

Following his arrest, defendant signed a *Miranda* waiver notifying him of his rights ("rights notification") and confessed to his involvement in the crime. Detroit Police Officer Jonathan Parnell wrote a statement recording defendant's confession which defendant initialed and signed. The prosecution then charged defendant with two counts of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and utilizing a motor vehicle during the commission of a felony, MCL 257.319(2)(d).

Defendant moved to suppress his statement arguing in part that he was incompetent to waive his *Miranda* rights. The trial court held a hearing on the matter and considered reports and testimony from the prosecution's expert, Dr. Judith S. Shazer, and defendant's expert, Dr. Norman S. Miller, who both evaluated defendant. Shazer and Miller concluded that defendant suffered from a mental disability and likely would not have understood his *Miranda* rights. Relying heavily on their opinions, the trial court granted defendant's motion to suppress the statement.

The question of whether a defendant's statement to police was voluntarily, knowingly, and intelligently made is reviewed de novo. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). But the trial court's findings of fact during a suppression hearing are reviewed for clear error, with deference to the lower court's "assessment of the credibility of witnesses and the weight accorded to the evidence." *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012). A finding is clearly erroneous if this Court is left with a firm and definite conviction that a mistake has been made. *Id*.

The United States and Michigan Constitutions guarantee a criminal defendant the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996). Statements made by a defendant during a custodial interrogation are therefore inadmissible absent a voluntary, knowing, and intelligent waiver of the defendant's Fifth Amendment rights. *Tierney*, 266 Mich App at 707, citing *Miranda*, 384 US at 444. "Whether a statement was voluntary is determined by examining police conduct, but the determination whether it was made knowingly and intelligently depends, in part, on the defendant's capacity." *Tierney*, 266 Mich App at 707. For instance, a mental illness that prompts the defendant to confess to a crime does not render the confession involuntary absent an element of police coercion. See *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515; 93 L Ed 2d 473 (1986). By contrast, the question of whether a defendant's waiver was knowingly and intelligently made requires the court to make "sweeping inquiries into the state of mind of a criminal defendant who confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State." *Cheatham*, 453 Mich at 21-22, quoting *Connelly*, 479 US at 167. Accordingly, the *Miranda* waiver analysis is bifurcated into two parts: (1) whether the defendant's waiver was voluntary, and; (2) whether the waiver was also knowing and intelligent. *People v Daoud*, 462 Mich 621, 639; 614 NW2d 152 (2000). The prosecutor bears the burden of proving that the defendant validly waived his rights by a preponderance of the evidence. *Tierney*, 266 Mich App at 707.

In determining whether a defendant's confession is voluntary, this Court considers the totality of the circumstances, including:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).]

No single factor is considered dispositive. *Tierney*, 266 Mich App at 708. The ultimate question is "whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, 431 Mich at 334.

To establish the knowing and intelligent prong, the prosecutor must demonstrate that defendant "[1] understood that he did not have to speak, [2] that he had the right to the presence of counsel, and [3] that the state could use what he said in a later trial against him." *Cheatham*, 453 Mich at 29. A defendant's IQ and his mental disability are certainly relevant to this analysis, but they are only two factors to be considered among the total circumstances that a court must assess in determining whether a defendant possesses the level of comprehension necessary to waive *Miranda*. *Id*. at 35-36, 40-43. Further, a defendant "need not fully appreciate the ramifications of talking to the police" to effect a knowing and intelligent waiver. *People v Abraham*, 234 Mich App 640, 647; 599 NW2d 736 (1999). It is sufficient that the defendant have a very basic or literal understanding of his rights, even if his mental incapacity or delusions "prevent[] him from appreciating those rights as they applied to his own situation." *Daoud*, 462 Mich at 642-644.

As an initial matter, the prosecution argues that voluntariness was not at issue in the trial court because defendant claimed that he never made the confession to police, not that the confession was coerced. Extending this reasoning, the prosecution also asserts that the trial court erred in holding a *Walker* hearing because such a hearing is warranted only in the instance of an alleged involuntary statement. We disagree. The voluntariness of defendant's confession was at issue in the lower court. Defendant told Miller that police told him that Gray and Lane would testify against defendant and that he would face "25 years to life in prison if he did not cooperate." The prosecution acknowledged, in its written response to defendant's motion to suppress, that defendant was arguing that his confession was involuntary. Further, the prosecutor expressly agreed to the trial court's offer to hold a hearing, thereby waiving her right to claim that a hearing was unnecessary. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). To the extent that the trial court erred in holding a hearing, the prosecution's agreement extinguished the error and it cannot support an appeal. See *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010) ("[A] party may not harbor error at trial and then use that error as an appellate parachute.").

Concerning the merits, the prosecution argues that the trial court "employed the wrong analysis" in suppressing defendant's statement by relying on a number of the voluntariness

factors instead of considering whether defendant's waiver was knowing and intelligent under the total circumstances, i.e., whether he had the mental capacity to understand and waive his *Miranda* rights. We agree. In granting defendant's motion to suppress, the trial court stated:

> It is just incomprehensible, based on [Shazer's] report and the corroboration from the report of Mr. Miller, that [Parnell's] perception was accurate. I mean, you just can't compare people that have talked to him, tested him, had information [sic] to him. I think Ms. Shazer says: Unless it was explained, paraphrased that there's no way Mr. Wade could have understood the *Miranda* rights.
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> So, the standard is totality of the situation. The prosecution argued because he had contact with the police before, therefore that contact was sufficient and that it wasn't his first time in this situation.
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> Well, I don't know how I can conclude that based on the lack of testimony. . . . There was no evidence that anybody read him his rights [during his prior contact with police]. There's no evidence that he signed a constitutional notification of rights. There's nothing to suggest that the contact would make him prepared or was even similar to the contact that he had in this particular case.
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> They say age is a consideration. I don't think age is as big a consideration as your maturity level and intellectual capacity at that age. Hey. How many songs have we heard that just recite age ain't [sic] nothing but a number? . . .
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> I think weighing all the factors, age, police contact, mental level, those are things that are to be considered. But the Court has the ability to assess and accord weight however it deems it should be weighed in terms of reasonableness and common sense. I'm going to conclude that the People haven't met their burden. I'm going to suppress his statement . . . .

Defendant's age, his prior contact with law enforcement, and his "mental level" are factors typically incorporated in the voluntariness test. See *Cipriano*, 431 Mich at 333-334. While defendant had raised the issue of coercion, the trial court acknowledged that the main purpose of the hearing was "competency to waive *Miranda*. It's not whether [defendant's statement] was voluntary." Moreover, despite applying the voluntariness factors, the trial court never rendered any finding concerning whether defendant's confession was coerced. It did not resolve the conflict between defendant's statement to Miller, that the police had threatened him with 25 years in prison if he did not cooperate, with his statement to Shazer, that the police had not threatened or mistreated him, and Parnell's testimony that he never made such a threat.

To be clear, we agree that defendant's IQ of 67, his mental disability, and his reading comprehension limitations should be considered in determining whether he made a knowing and intelligent waiver, but these factors must be applied in the greater context of whether "the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Daoud*, 462 Mich at 637 (citation omitted). The trial court apparently understood its obligation to consider the "totality of the situation," but treated Shazer's and Miller's opinions as determinative on the issue of whether defendant understood these *Miranda* concepts. This was in error. "Low mental ability in and of itself is insufficient to establish that a defendant did not understand his rights." *Cheatham*, 453 Mich at 36. Further, "waiver and [a] defendant's competence to waive rights are legal, not psychological, concepts, and the judge, not an expert witness, is the ultimate decision maker on these issues." *Id*. at 34, quoting *State v Cleary*, 161 Vt 403, 406; 641 A2d 102 (1994).

In that same vein, the lower court should not assume that defendant's mental disability forecloses an understanding of his rights. "Clearly, the mentally retarded population is as heterogenous as the nonmentally retarded and blanket statements regarding this group of persons are no more appropriate than any stereotype. In determining whether to suppress a confession, a trial judge should examine all available and relevant information." *Cheatham*, 453 Mich at 42.

Most importantly, the trial court did not address the remaining total circumstances of the interrogation. While the question of whether a defendant's waiver is knowing and intelligent "necessarily involves an inquiry into the suspect's level of understanding, this can only be done by examining the objective circumstances surrounding the waiver." *Daoud*, 462 Mich at 634. Defendant told Miller and Shazer that the police asked him to write a statement and that he refused, demonstrating knowledge of his right to remain silent and of the fact that the police intended to use the requested statement against him. See, e.g., *Cheatham*, 453 Mich at 35 (the defendant's withholding of information from the police demonstrated his awareness that the information would be used against him). Defendant also admittedly signed the waiver and confession. Even in the case of a mentally impaired defendant, a "written waiver in particular is strong evidence that the waiver is valid," as is defendant's acknowledgement to Miller and Shazer that he did not ask the police any questions concerning his rights or the signed confession. *Id*. at 31 (quotation and citation omitted). According to Miller's and Shazer's reports, defendant also understood key concepts in the legal case against him, including "the charges . . . that he has to assist his attorney . . . and [that] the judge and jury decide his fate. The jury finds him guilty or not guilty, and the judge sentences him." Defendant also "understood that he was facing the possibility of a lengthy prison sentence (he estimated [4] to 20 years)." This knowledge supports a finding of competency to waive *Miranda*. See *Abraham*, 234 Mich App at 653. In addition, the trial court also failed to determine whether the police had read defendant his rights as he told Miller, or whether they simply gave him a copy of the rights notification and directed him to "try his best" to read it himself as he had reported to Shazer.

In sum, the trial court applied the incorrect legal standard in determining the validity of defendant's *Miranda* waiver. We vacate the trial court's order granting defendant's motion to suppress and remand for proper consideration of whether: (1) defendant's waiver was voluntary; and (2) whether it was knowing and intelligent under the total circumstances. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood